



## Notre Dame Law Review

---

Volume 42 | Issue 5

Article 6

---

1-1-1967

# Reent Decisions

Robert R. Rossi

William T. Coleman

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Robert R. Rossi & William T. Coleman, *Reent Decisions*, 42 Notre Dame L. Rev. 806 (1967).

Available at: <http://scholarship.law.nd.edu/ndlr/vol42/iss5/6>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## RECENT DECISIONS

AIR LAW — WARSAW CONVENTION — AN INTERNATIONAL AIR CARRIER IS DEPRIVED OF ITS BENEFITS UNDER THE CONVENTION IF IT FAILS TO DELIVER A TICKET TO THE PASSENGER STATING THAT THE TRANSPORTATION IS SUBJECT TO THE LIABILITY RULES OF THE CONVENTION; THE STATEMENT IN THE STANDARD TICKET AND BAGGAGE CHECK DOES NOT GIVE THE PASSENGER THE REQUIRED NOTICE. — On February 26, 1960, while en route from Rome, Italy, to New York City, an aircraft owned and operated by Alitalia-Linee Aeree Italiane, S.p.A., crashed shortly after taking off from Shannon, Ireland. Five suits for wrongful death, personal injuries, and property damage allegedly suffered by thirteen of the passengers aboard the aircraft were brought and consolidated in the United States District Court for the Southern District of New York. In answering these complaints, Alitalia pleaded as affirmative defenses those articles of the Warsaw Convention<sup>1</sup> that serve to exclude or limit an international air carrier's liability to its passengers.<sup>2</sup> Prior to trial, plaintiffs moved for a partial summary judgment to dismiss these affirmative defenses. They claimed that under articles 3 and 4 of the Convention, such defenses were not available to Alitalia unless it had delivered a passenger ticket and baggage check that notified the passenger that the liability rules of the Convention were applicable to the flight.<sup>3</sup> Plaintiffs also claimed that the tickets and baggage

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter cited as the Warsaw Convention), 49 Stat. 3000, T.S. No. 876 (concluded at Warsaw, Oct. 12, 1929; adherence by United States, June 27, 1934; effective Oct. 29, 1934). For a list of the approximately ninety nations which are parties to the Convention as of Jan. 1, 1966, see TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISOR, U.S. DEPT OF STATE, TREATIES IN FORCE 227 (1966).

2 Article 20(1) of the Warsaw Convention, 49 Stat. 3019, T.S. No. 876, provides: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 21 of the Warsaw Convention, 49 Stat. 3019, T.S. No. 876, provides: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." Article 22 of the Warsaw Convention, 49 Stat. 3019, T.S. No. 876, provides in part:

(1) In the transportation of *passengers* the liability of the carrier for each passenger shall be *limited* to the sum of 125,000 francs [approximately \$8,300]. . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of *checked baggage and of goods*, the liability of the carrier shall be *limited* to a sum of 250 francs per kilogram [approximately \$7 per pound], unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum . . . (Emphasis added.)

3 Article 3 of the Warsaw Convention, 49 Stat. 3015, T.S. No. 876, provides:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;  
(b) The place of departure and of destination;  
(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;  
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect

checks delivered had not so notified the passengers. Alitalia maintained that a carrier could invoke the defenses and limitations in regard to liability for personal injury or death, provided it had delivered a ticket to the passengers before departure, even though the ticket had not notified the passengers of the Convention's liability provisions. Alitalia claimed that, in any event, the tickets and checks delivered had so notified the passengers. The district court granted plaintiffs' motion to strike Alitalia's affirmative defenses. The court, however, stayed the trial pending a determination by the United States Court of Appeals for the Second Circuit on the controlling question of whether the challenged affirmative defenses were available to Alitalia on the facts presented. After granting Alitalia's application for leave to appeal pursuant to the Interlocutory Appeals Act,<sup>4</sup> the United States Court of Appeals for the Second Circuit (Moore, J. dissenting) affirmed the district court's judgment on the motion and *held*: although the wording of article 3(2) of the Warsaw Convention deprives the carrier of those provisions which exclude or limit liability for personal injury or death only where the carrier fails to "deliver" a ticket to the passenger before departure, this sanction also applies when the ticket fails to include a statement that the transportation is subject to the liability rules of the Convention. The court further found that the statement included in the standard tickets and baggage checks was in "exceedingly small print" and could not have given the passengers the required notice. *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966).

The Warsaw Convention of 1929, promulgated in a day when commercial aviation was in its infancy, is today the most widely accepted treaty on international commercial law. Its provisions were intended to achieve two primary goals: first, to establish a uniform system of commercial law governing interna-

---

the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.* (Emphasis added.)

Article 4 of the Warsaw Convention, 49 Stat. 3015-16, T.S. No. 876, provides:

- (1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.
- (2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.
- (3) The baggage check shall contain the following particulars:
  - (a) The place and date of issue;
  - (b) The place of departure and of destination;
  - (c) The name and address of the carrier or carriers;
  - (d) The number of the passenger ticket;
  - (e) A statement that delivery of the baggage will be made to the bearer of the baggage check;
  - (f) The number and weight of the packages;
  - (g) The amount of the value declared in accordance with article 22(2);
  - (h) *A statement that the transportation is subject to the rules relating to liability established by this convention.*
- (4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. *Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.* (Emphasis added.)

4 28 U.S.C. § 1292(b) (1964).

tional transportation by air; second, to protect the then infant international air industry from extinction due to excessive claims by establishing limitations on the air carrier's liability. Although these goals have been substantially achieved, and although the Convention is presently the most widely accepted treaty on international commercial law, it has also become one of the most controversial.

Most of the controversy has centered upon article 22 of the Convention, which establishes a ceiling on the air carrier's liability to passengers for death or personal injury. This ceiling was set at \$8,300 in 1929 and has remained unchanged to the present day. For this reason, article 22 has become a veritable storm center, particularly in the United States.<sup>5</sup> Several international attempts have been made to abate this storm. The most important of these was the conference that was convened at the Hague in 1955. This conference resulted in the Hague Protocol to amend the Warsaw Convention. The limitation on the carrier's liability for death or personal injury was doubled to \$16,600.<sup>6</sup> However, the amendments to the Convention made by this Protocol are not yet in effect since the Protocol has not been ratified by the requisite number of nations. The most prominent nation which has not thus far ratified the Protocol is the United States.<sup>7</sup> Rather than ratifying the Hague Protocol, the United States has reached an "interim agreement" with the international air carriers serving this country. In the main, this agreement provides that the carrier will be liable for up to \$75,000 for death or personal injury of a passenger, inclusive of costs, under conditions of absolute liability.<sup>8</sup> Thus, while the Convention is still in force in the United States, it survives in radically modified form.<sup>9</sup>

5 As the most recent authoritative commentary on the Convention has pointed out, the \$8,300 limit "was low even in 1929." Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499 (1967).

6 See 1 ICAO, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 1955, at 294-300, ICAO Doc. No. 7686-LC/140 (1956).

7 For a general discussion of the reasons the Hague Protocol has not been ratified by the United States, see Lowenfeld & Mendelsohn, *supra* note 5, at 509-16.

8 By 1965, American insistence on a higher limitation finally collided with its interest in remaining a party to the Convention. On November 15, 1965, the United States sent its notice of denunciation of the Warsaw Convention to the Polish Government, the depository of the Convention. The notice stated that the United States opposed the Convention's low limits on liability for personal injuries and that it would withdraw from the Convention at the end of six months pursuant to provision in the Convention. The State Department made it known, however, that if the world's international air carriers agreed to raise the limitation, first to \$75,000, and ultimately to \$100,000, the notice of denunciation would be withdrawn. The "interim agreement" was reached and drafted just days before the United States withdrawal would have become effective. The United States withdrew its notice of denunciation on May 14, 1966. The text of the notice of denunciation may be found in Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 303 (1965). A description of the events leading up to the withdrawal of the notice of denunciation and the text of the withdrawal may be found in *The Warsaw Convention — Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. AIR L. & COM. 243 (1966). The text of the "interim agreement" may be found in 1 KREINDLER, *Aviation Accident Law* 149-52 (Supp. 1966).

9 The Warsaw Convention was not amended by the "interim agreement"; the treaty remains intact. All the carriers have done is to provide for the making of "special contracts" with the passenger pursuant to article 22(1) (see note 2 *supra*). By these special contracts, the carrier agrees that it will not assert its limitation under the Convention up to \$75,000 and that it will not assert its defenses under article 20(1) (see note 2 *supra*). KREINDLER, *op. cit. supra* note 8, at 148-49. Since these "special contracts" were not in effect until 1966, the "interim agreement" has no direct effect on *Lisi*. *Lisi*, however, may have an effect on the "interim agreement." See note 77 *infra*.

In addition to the controversy surrounding the particular limitation on recovery of damages established by the Convention, the *principle* of limiting the carrier's liability has come under increasingly strong criticism. Whereas some commentators have considered international air law "unthinkable without a limitation of the carrier's or operator's liability,"<sup>10</sup> others have criticized limited liability as "indefensible morally, sociologically, and economically."<sup>11</sup>

It is within this context of international politics and controversy that the decision in *Lisi* must be viewed. *Lisi* deprives the international air carrier of its limited liability under existing conditions and seriously impairs the carrier's opportunity to avail itself of the privilege in the future.

The manner in which the Second Circuit accomplished this result was through its interpretation of article 3<sup>12</sup> of the Convention, which governs the issuance of passenger tickets. The ticket is all important in determining whether the Convention is applicable to a particular transportation. Article 1(1) provides that the "convention shall apply to all international transportation . . . by aircraft for hire."<sup>13</sup> Article 1(2) defines "international transportation" as any transportation in which, "according to the contract made by the parties," the transportation is between the territory of two contracting states or, where the place of departure and place of destination are in the same contracting state, but there is an agreed stopping place within the territory of another power.<sup>14</sup> According to the "contract made by the parties" in *Lisi*, the transportation was between the territory of two contracting parties, the United States and Italy, and was thus clearly international.<sup>15</sup>

When the Convention is applicable, as it was in *Lisi*, articles 17 and 18 provide that the international air carrier is *presumptively* liable for death or bodily injuries suffered by the passengers while on board its aircraft and for the destruction or loss of checked baggage.<sup>16</sup> As has been previously noted, however, this liability is circumscribed by article 22 which limits the carrier's liability for the death or personal injury of each passenger to approximately

10 DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 1 (1954). For other commentary generally favorable to the concept of limited liability, see Committee on Aeronautics, Association of the Bar of the City of New York, *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. AIR L. & COM. 255 (1959); Sand, *Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation Under the Warsaw Convention*, 28 J. AIR L. & COM. 260 (1961-62).

11 Association of the Bar of the City of New York, *supra* note 10, at 268 (dissenting views). See also KREINDLER, *op. cit. supra* note 8, § 11.01[5]; N.Y. Times, Oct. 23, 1965, p. 30, col. 2 (city ed.).

12 See note 3 *supra*.

13 Warsaw Convention, art. 1(1), 49 Stat. 3014, T.S. No. 876.

14 Warsaw Convention, art. 1(2), 49 Stat. 3014, T.S. No. 876.

15 For a replica of the ticket coupon, see *Lisi v. Alitalia Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 242 (S.D.N.Y. 1966). The situation in *Lisi* was relatively simple. In other cases, however, it may be highly complicated. Article 1(3) of the Warsaw Convention, 49 Stat. 3015, T.S. No. 876, provides that "transportation to be performed by several successive air carriers shall be deemed . . . one undivided transportation . . . whether it has been agreed upon under the form of a single contract or of a series of contracts." With this provision and the fact that transportation is "international" according to the place of departure and the place of ultimate destination, a number of complex travel patterns that would appear not to be "international transportation" in actuality are such transportation. For some examples, see Lowenfeld & Mendelsohn, *supra* note 5, at 501.

16 Warsaw Convention, art. 17, 49 Stat. 3018, T.S. No. 876; Warsaw Convention, art. 18, 49 Stat. 3019, T.S. No. 876.

\$8,300<sup>17</sup> and its liability for checked baggage and goods to approximately seven dollars per pound.<sup>18</sup>

Not only is the amount of damages recoverable from the carrier limited, but the *presumption* of liability raised by articles 17 and 18 is rebuttable so that under certain circumstances, the carrier may escape liability altogether. Article 20(1), Alitalia's second affirmative defense, allows the carrier to escape liability if it "proves" that it and its agents "have taken all necessary measures to avoid the damage or that it was impossible . . . to take such measures."<sup>19</sup> The usefulness of this provision to the carrier, however, is more theoretical than real in most if not all major air disasters. Whether or not members of the crew survive to give testimony, it is extremely difficult, if not altogether impossible, for the carrier to prove that "all necessary measures" were taken.<sup>20</sup> The carrier's liability in these cases is best characterized as absolute, although the amount of damages recoverable remains limited.

Before the carrier may invoke the defense of limited liability under article 22 or attempt to escape liability altogether under article 20(1), prior to departure it must have "delivered" to the passenger a ticket and, where applicable, a baggage check. Article 3(1) requires that in the transportation of passengers the carrier "must deliver" a ticket that "shall" contain certain "particulars." One of the prescribed particulars is "a statement that the transportation is subject to the rules relating to liability established by this convention."<sup>21</sup> Article 3(2), however, begins with the seemingly contradictory statement that the "absence, irregularity, or loss" of the ticket shall not affect the contract of transportation, "which shall none the less be subject to the rules of this convention."<sup>22</sup> Article 3(2) goes on to state that, "nevertheless, if the carrier accepts a passenger without a passenger ticket having been *delivered* he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." (Emphasis added.)<sup>23</sup> Because of article 3's anomalous structure, the Second Circuit in *Lisi* was faced with the question of whether or not the sanction for failure to "deliver" a ticket also applies when a ticket has been delivered, but such ticket does not state that the transportation is subject to the liability rules of the Convention.

The sanction for failure to deliver a ticket is severe.<sup>24</sup> Since the carrier may not avail itself of those provisions which "exclude or limit" its liability, its liability in such a case is *absolute and unlimited*.<sup>25</sup> All the plaintiff need prove is the extent of his damages.<sup>26</sup> In *Lisi*, the Second Circuit concluded that the sanc-

17 See note 2 *supra*.

18 *Ibid.*

19 *Ibid.* See also article 21, *supra* note 2.

20 See *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

21 See note 3 *supra*.

22 *Ibid.*

23 *Ibid.*

24 One commentator stated "the penalty for failure to deliver a ticket seems positively savage." Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. AIR L. & COM. 395, 398 (1949).

25 SHAWCROSS & BEAUMONT, AIR LAW § 406(c) (2d ed. 1951); Kreindler, *supra* note 8, at 296.

26 SHAWCROSS & BEAUMONT, *op. cit. supra* note 25, at 383.

tion in article 3(2) for failure to deliver a ticket also applies when a passenger ticket has been delivered lacking the statement of the Convention's applicability. It is submitted that this reading of the sanction in article 3(2) is supported neither by the structure of the Convention's section governing traffic documents, nor by that section's legislative history.

A comparative analysis of the language in article 3 with that in other articles of the Convention governing traffic documents is highly significant in determining the meaning of this article. Articles 4(3)<sup>27</sup> and 8<sup>28</sup> specify the particulars to be included in the baggage check and air waybill, respectively. As in the provisions for the passenger ticket in article 3(1), one of the specified particulars is a statement that the transportation is subject to the liability rules of the Convention. When the provision for "sanctions" in each of the three articles is examined, however, a distinction is readily apparent. Article 4(4) provides that if the baggage check is not delivered or omits the specified statement, the carrier may not avail itself of those provisions that exclude or limit its liability.<sup>29</sup> Article 9 imposes the same sanction if the air waybill is not delivered, or the specified statement is omitted.<sup>30</sup> When the sanction relating to passenger tickets is considered, however, the language of article 3(2) deprives the carrier of its benefits only where no ticket is *delivered* at all; the article does not mention a sanction in the event a ticket has been delivered omitting the specified statement.<sup>31</sup>

This comparative analysis has been instrumental in determining the outcome in the two cases, prior to *Lisi*, that interpreted the sanction of article 3(2) in respect to the specified particulars. In *Grey v. American Airlines, Inc.*,<sup>32</sup> plaintiff contended that the sanction of article 3(2) should be imposed because the passenger tickets delivered had not set forth the agreed stopping places, as required by article 3(1).<sup>33</sup> The district court opinion, which was adopted by the Second Circuit, rejected the contention. The district court stated that

*Article 3 (2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4 (4) and 9. I must conclude that this omission or difference is most significant. For I cannot agree with plaintiffs' argument . . . when those who drafted the treaty were so explicit in this regard in Articles 4 (4) and 9. (Emphasis added.)*<sup>34</sup>

*Grey* was followed by the Queen's Bench Division in *Preston v. Hunting Air Transp., Ltd.*,<sup>35</sup> where the agreed stopping places were likewise omitted from the ticket.<sup>36</sup> When Alitalia advanced a similar analysis in *Lisi*, however, the court

27 See note 3 *supra*.

28 Warsaw Convention, 49 Stat. 3016-17, T.S. No. 876.

29 See note 3 *supra*.

30 Warsaw Convention, 49 Stat. 3017, T.S. No. 876.

31 See note 3 *supra*.

32 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956), *affirming*, 95 F. Supp. 756 (S.D.N.Y. 1950).

33 See note 3 *supra*.

34 *Grey v. American Airlines, Inc.*, 95 F. Supp. 756, 758 (S.D.N.Y. 1950).

35 [1956] 1 Q.B. 454.

36 See also *Pauwels v. Sabena*, 1950 U.S. Av. 367 (Bel. 1950). "In their pleadings the claimants seemed to have confused article 3 with article 9 which, for the carriage of goods (and goods only), laid down a particular sanction, namely, the loss of the benefit of limited liability." *Id.* at 374.

rejected it and stated, "It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us."<sup>37</sup> The Second Circuit's negative response to the comparative analysis is somewhat surprising in view of its previous holding in *Grey*.

The Second Circuit's response is also somewhat strained because its decision is not supported by the legislative history surrounding the Convention's traffic documents section. The minutes of the Warsaw Convention clearly evidence an intention by the drafters to restrict the sanction in article 3(2) to the situation where no ticket at all has been delivered. The advance draft of article 3, prepared in 1928, provided that the sanction would be imposed if the passenger ticket omitted any of the prescribed particulars.<sup>38</sup> The drafters, however, were of the opinion that this sanction was too severe to be imposed against the carrier merely because the ticket omitted one or more of the prescribed particulars. Thus, article 3(2) as finally adopted, left the form of the passenger ticket up to the carrier and did not impose a sanction should the ticket fail to contain the particulars listed in article 3(1).<sup>39</sup>

Dr. Goedhuis, author of the first critical analysis of the Convention, agreed that the change from the 1928 draft supports this interpretation of the drafters' intention, but noted the logical inconsistency that the change created.<sup>40</sup> Goedhuis questioned the logic of restricting the scope of the sanction in regard to the passenger ticket while not doing so in regard to the baggage check and air waybill. After all, the proposal to change the 1928 draft "extended logically to all the traffic documents and not only to the passenger ticket."<sup>41</sup> However illogical this change would appear, Goedhuis nonetheless concluded that the carrier is not deprived of its benefits under the Convention if it delivers a passenger ticket not in conformity with the provisions of 3(1) "since the Convention has not provided for any sanction against such omissions."<sup>42</sup>

The minutes of the Hague Conference are also informative with respect to the sanction in article 3(2). The United States proposed that the sanction in this article be extended to failure to include notice of the Convention's applicability to the transportation. During the debates on this proposal, the delegates made several references to the Convention drafters' intention to restrict the sanction in article 3(2) to complete failure of ticket delivery.<sup>43</sup> The United States proposal was eventually adopted; and article 3(2), as amended by the Hague Protocol, provides that the sanction will be imposed if the ticket fails

37 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 511 (2d Cir. 1966).

38 II<sup>ème</sup> CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, ICAO Doc. No. 7838, at 167-68.

39 See *id.* at 101-102, 129.

40 See GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 156-57 (1937). See also DRION, *op. cit. supra* note 10, at 251; SHAWCROSS & BEAUMONT, *op. cit. supra* note 25, at 406.

41 GOEDHUIS, *op. cit. supra* note 40, at 152. The change is also illogical from another standpoint. More reason would seem to exist for requiring the prescribed statement in the passenger ticket than in the provisions for shipment of goods since the merchant engaged in shipping would most likely know of the Convention's liability limitations.

42 *Id.* at 156-57.

43 See I ICAO, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 1955, at 66-91, ICAO Doc. No. 7686-LC/140 (1956).



to include notice that the liability rules of the Convention may be applicable to the transportation.<sup>44</sup>

Although Alitalia's brief contained extensive citation to both the legislative history surrounding article 3(2) and the pertinent commentary, both by the authorities and in the Hague Conference debates, the Second Circuit failed to even mention them in its opinion in *Lisi*. Instead, the court chose to base its interpretation of the language in article 3(2) upon two cases, not quite on point, and upon its own view of the "overall purposes of the Convention."<sup>45</sup>

In *Mertens v. Flying Tiger Line, Inc.*,<sup>46</sup> the Second Circuit was called upon to decide whether presentation of a ticket to a military officer already on board an aircraft about to take off constituted a "delivery" within the meaning of article 3(2). In that case, the court read article 3(2) to require that the "ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability."<sup>47</sup> Such self-protective measures could consist of the passenger deciding not to take the flight or taking out flight insurance. Another protective measure, not quite so obvious, is contained in article 22(1) of the Convention which provides that a passenger may enter into a "special contract" with the carrier for a higher limit of liability.<sup>48</sup> In *Mertens*, it was reasoned that it would be illogical to incorporate the "special contract" provision, to require that the ticket state that the carrier's liability is limited, and further to require that such a ticket be delivered, "unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures."<sup>49</sup> The court accordingly held, as a matter of law, that the delivery was not adequate and the Convention's limitation of damages was inapplicable.<sup>50</sup>

A short time later, the Ninth Circuit reached a similar result in *Warren v. Flying Tiger Line, Inc.*<sup>51</sup> In that case, soldiers were handed a "boarding ticket" at the foot of the ramp leading to an aircraft which was about to take off. The Ninth Circuit was of the opinion that "it is an implied requirement of Article 3(2) that delivery of the passenger ticket be made sufficiently in advance of

<sup>44</sup> For the text of the Hague Protocol, see SHAWCROSS & BEAUMONT, AIR LAW xvii-xxviii (2d Supp. 2d ed. 1955). The Protocol amends article 3 of the Convention to read:

1. In respect of the carriage of passengers a ticket shall be delivered, containing: . . . (c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

2. . . . Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22. *Id.* at xviii-xix.

<sup>45</sup> *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 512 (2d Cir. 1966).

<sup>46</sup> 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

<sup>47</sup> *Id.* at 856.

<sup>48</sup> See note 2 *supra*.

<sup>49</sup> *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

<sup>50</sup> *Id.* at 856.

<sup>51</sup> 352 F.2d 494 (9th Cir. 1965). Comment, 19 VAND. L. REV. 979 (1966).

the flight so that the passenger may, if he desires, obtain additional insurance protection."<sup>52</sup>

Both *Mertens* and *Warren* were concerned with the "timeliness" of preflight delivery within the meaning of the requirement in article 3(2) rather than the precise question presented to the court in *Lisi*. Delivery was untimely because the statement in the ticket could not have been read in time for the passenger to have taken self-protective measures. To reach this conclusion, both courts assumed that the ticket had to contain the specified statement. This was a logical assumption, because otherwise the required delivery of a ticket would be of little use to the passenger. Although this may have been a logical assumption, it is contrary to the drafters' intention in not providing for a sanction when the ticket lacks the specified statement. The court in *Lisi* chose to ignore the drafters' intention and to rely upon the reasoning in *Mertens* and *Warren*.

As previously mentioned, the Second Circuit in *Lisi* also based its decision upon its view of the "overall purposes of the Convention."<sup>53</sup> The court stated that the "Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier."<sup>54</sup> The court was of the further opinion that

the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially.<sup>55</sup>

As the dissent observed, however, the court did "not approve of the terms of the treaty" and offset what it thought was a "one-sided advantage" by a "judicial requirement that the passenger have notice of the limitation of liability." (Emphasis added.)<sup>56</sup> Although it is true that the liability limit established by the Convention for death or personal injury has been criticized, and while a substantial revision upward of the liability limit is admittedly needed, it is difficult to see how such criticism and need for revision justify a federal court in rendering an interpretation of an international treaty not intended by its drafters.

Having concluded that the sanction in article 3(2) applies when the ticket omits the statement of the Convention's applicability, the court went on to consider whether the statements in the tickets and baggage checks involved in *Lisi* gave the required notice. The tickets and checks were printed in the form used generally throughout the industry and required by the International Air Transport Association, of which Alitalia is a member.<sup>57</sup> On the front of the

<sup>52</sup> *Id.* at 498.

<sup>53</sup> *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 512 (2d Cir. 1966). The court, of necessity, also had to reconcile *Grey* (see text accompanying notes 32-34 *supra*) with *Mertens* and *Warren*. *Grey* was found to be "perfectly consistent with these cases in that the failure to list the agreed stopping places in that case had 'in no way deprived [the passengers] . . . of 'a reasonable opportunity to take self-protective measures.'" *Id.* at 513 n.8.

<sup>54</sup> *Id.* at 512-13.

<sup>55</sup> *Id.* at 513.

<sup>56</sup> *Id.* at 515 (dissenting opinion).

<sup>57</sup> Brief for Defendant, p. 24, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966).

ticket and baggage check booklet, "in exceedingly small print,"<sup>58</sup> there was a statement directing the passenger to examine the "Conditions on page 4."<sup>59</sup> The court noted that the conditions were printed in such a manner that "even if a passenger were able to read the printing . . . it is highly questionable whether he would be able to understand the meaning of the language contained thereon."<sup>60</sup> Under the passenger's name at the bottom of each flight coupon in the passenger ticket and baggage check, in the same fine print, appeared the statement:

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.<sup>61</sup>

This latter statement and its location in the passenger ticket and baggage check were approved by the Civil Aeronautics Board of the United States in *Pan American World Airways, Conditions of Carriage and Related Traffic Regulations*.<sup>62</sup> The statement as to the applicability of the Convention's rules of liability, contained on page four of the standard passenger ticket and baggage check, has likewise been held to be legally sufficient for the Convention.<sup>63</sup> There are no reported decisions which support the district court's conclusion in *Lisi*, subsequently adopted by the Second Circuit,<sup>64</sup> that the statement at the bottom of each flight coupon and the statement of conditions on page four were inadequate because of the size of type and its location in the ticket and baggage check. However, the language in several cases is highly critical.<sup>65</sup> Moreover, the CAB has taken notice of the difficulty the average passenger would have in reading and interpreting the statement. In 1963, the Board altered its previous position and issued an order calling for a statement giving notice of the carrier's limited liability in ten-point modern type.<sup>66</sup> The carriers have not, however, complied with this CAB order.<sup>67</sup> Neither have the carriers complied with the

58 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, *supra* note 57, at 513.

59 For a reproduction of the ticket cover and the conditions, see *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 240-41 (S.D.N.Y. 1966).

60 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 n.10 (2d Cir. 1966).

61 See reproduction of ticket coupon, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 242 (S.D.N.Y. 1966).

62 24 C.A.B. 575, 578 (1957).

63 See *Seth v. British Overseas Airways Corp.*, 329 F.2d 302, 307 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964); *Manufacturers Hanover Trust Co. v. American Airlines, Inc.*, 23 App. Div. 2d 832, 259 N.Y.S.2d 277 (1965).

64 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966).

65 See *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (9th Cir. 1965); *Eck v. United Arab Airlines, Inc.*, 20 App. Div. 2d 454, 457 n.2, 247 N.Y.S.2d 820, 824 n.2, *rev'd on other grounds*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964).

66 14 C.F.R. § 221.175 (1965). The Hague Conference rejected an American proposal that the statement adopted by the Conference be printed in letters of a certain size and color. See ICAO, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 1955, at 60, 75, 124, ICAO Doc. No. 7686-LC/140 (1956).

67 Letter from George N. Tompkins, Jr., counsel for Alitalia, Feb. 17, 1967, on file with the *Notre Dame Lawyer*.

ticket form required by the 1966 "interim agreement."<sup>68</sup> Thus, the standard ticket and baggage check held legally insufficient in *Lisi* is still in use.

The question left remaining is whether the carriers can ever produce a ticket and baggage check form which would be legally sufficient under the holding in *Lisi*. Even if the carriers were to adopt a new ticket form, with an appropriate statement prominently displayed in large type, it is unlikely that the requirement laid down in *Lisi* could be met. Whereas the present ticket statement reads that the Warsaw Convention "may" be applicable, *Lisi* requires the ticket to contain a statement that the transportation "is" subject to the liability rules of the Convention.<sup>69</sup> In essence, the Second Circuit would require the airlines to take measures to give *actual notice* of the Convention's applicability to the particular transportation.

Actual notice is subject to several difficulties. In many instances, for example, it is "next to impossible" even for a trained lawyer to determine whether the particular transportation contracted for is definitely subject to the Convention.<sup>70</sup> It is because of this difficulty that all tickets, domestic and international, presently warn, or at least state, that the Convention "may" apply to the transportation.<sup>71</sup> The statement adopted by the Hague Conference also employs the word "may" for the same reason.<sup>72</sup> Actual notice would require two ticket forms, one for domestic and one for international carriage. It would further require that the booking clerk first interpret the Convention's definition of "international transportation" in view of the passenger's travel plans and then give the passenger the appropriate ticket.<sup>73</sup> The dissent in *Lisi* noted that the majority's opinion would require the air carrier to have its agents explain to each passenger "the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both understood and agreed to the limitation."<sup>74</sup> Although a system designed to give actual notice of the Convention's applicability to the transportation would not necessarily have to be as extensive as that described by the *Lisi* dissent, any such system, in which mistakes costly to the air carrier would be inevitable, would be unworkable.<sup>75</sup>

Unless *Lisi* is reversed or modified,<sup>76</sup> its ramifications and impact on international air law, in addition to the carrier's inability to give actual notice of the Convention's applicability, may be readily perceived. One significant ramification is *Lisi*'s effect on future airline litigation in the United States. In cases not yet filed, and in those filed where amendment may yet be made, the plain-

68 *Ibid.*

69 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 511 (2d Cir. 1966).

70 *Calkins, Grand Canyon, Warsaw and the Hague Protocol*, 23 J. AIR L. & COM. 253, 261 (1956).

71 See note 61 *supra* and accompanying text.

72 See note 44 *supra*.

73 See note 15 *supra*.

74 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966).

75 See *Calkins, supra* note 70, at 261.

76 At this time, Alitalia's petition for rehearing has been denied and Alitalia has made a motion to stay issuance of the mandate pending its filing of a petition for writ of certiorari in the Supreme Court. Letter from George N. Tompkins, Jr., counsel for Alitalia, Feb. 8, 1967, on file with the *Notre Dame Lawyer*.

tiff's attorney need only plead an inadequate ticket in order to invoke the "delivery" sanction of article 3(2).<sup>77</sup> *Lisi's* impact on the air carriers and aviation insurance companies is also readily apparent. Most international air carriers presently carry liability insurance.<sup>78</sup> Since *Lisi* has opened the door to unlimited recoveries against the air carriers, while at the same time depriving them of their defenses, air carriers will certainly desire to have greater insurance coverage. The cost of this coverage will eventually be borne by the air passenger.<sup>79</sup>

Perhaps the most important ramification of *Lisi* will be its effect internationally.<sup>80</sup> In *Preston*,<sup>81</sup> the English court followed the Second Circuit's decision in *Grey*,<sup>82</sup> thereby contributing to a uniform interpretation of the Convention, the first goal of which was the creation of a uniform system of rules. Should *Lisi* be followed in foreign courts, uniformity will be achieved, but at the expense of completely emasculating the second goal of the Convention; viz, limitation of the international air carrier's liability. If *Lisi* is not followed internationally, air law under the Convention will be subject to a great schism: the Convention imposing unlimited liability in the United States, but providing a limitation in other quarters of the world.<sup>83</sup> In either case, the Second Circuit has dealt a sharp blow to the future of international air law.

If the court were interpreting a purely domestic statute, its decision would be commendable as safeguarding the interests of the international air passenger. The court was not, however, interpreting a purely domestic statute, but rather a widely accepted treaty. The nations adhering to this treaty have not been insensitive to the plight of the international air passenger. These nations, however, have sought to protect him by amending the Convention. Moreover, by reading into the Convention a provision which is not there, and which the Convention drafters never intended to be there, the Second Circuit has in effect destroyed a treaty which even its own government has sought to retain.<sup>84</sup> As

77 The resulting absolute and unlimited liability might also be the result under the 1966 "interim agreement," commented upon in note 9 *supra*. Since the basis of the "interim agreement" is the "special contract" clause of article 22(1), a plaintiff's attorney would argue that the air carrier had made a unilateral offer never accepted by the passenger. This would invoke application of the Convention in its basic form and *Lisi* would be applicable whether the standard ticket or the ticket required by the "interim agreement" had been delivered. The ticket required by the "interim agreement" also employs the word "may" in its warning to the passenger. See 1 KREINDLER, AVIATION ACCIDENT LAW 151-52 (Supp. 1966).

78 Sand, *Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation Under the Warsaw Convention*, 28 J. AIR L. & COM. 260, 269 (1961-62).

79 For an excellent analysis of the problems involved and a discussion of the alternate courses the air carriers might pursue in the area of insurance, see Sand, *supra* note 78.

80 The House of Commons has already debated the effects of *Lisi*. H.C.: 740 Official Rep. 139, cols. 1569-93 (Feb. 8, 1967); Letter from George N. Tompkins, Jr., counsel for Alitalia, Feb. 17, 1967, on file with the *Notre Dame Lawyer*.

81 See note 35 *supra* and accompanying text.

82 See note 32 *supra*.

83 This could have a very practical implication in certain cases. Article 28(1) of the Warsaw Convention, 49 Stat. 3020, T.S. No. 876, provides four places in which suit may be brought under the Convention: the domicile of the carrier; its principal place of business; where it has a place of business through which the contract for transportation has been made; or the place of destination. Under the proper circumstances, a foreign plaintiff would find it highly rewarding to bear the added expense in order to bring suit in the United States rather than in his own country.

84 The words "interim agreement" would seem to be self-explanatory. It is difficult to see how the agreement can be so called now that one of the Convention's major provisions has been emasculated.

the dissent noted, "judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government . . . ."<sup>85</sup> In not applying this principle, the majority in *Lisi* were, as the dissent pointed out, indulging in "judicial treaty-making."<sup>86</sup>

Robert R. Rossi

---

BANKRUPTCY — NEGOTIABLE INSTRUMENTS — BANK THAT HONORED CHECKS OF DEPOSITOR PRESENTED FOR PAYMENT AFTER HE HAD FILED A VOLUNTARY PETITION IN BANKRUPTCY NOT LIABLE TO TRUSTEE IN BANKRUPTCY FOR AMOUNTS SO PAID WHERE BANK HAD NO KNOWLEDGE OF THE BANKRUPTCY PROCEEDINGS.—Between August 27 and September 17, 1963, Marin Seafoods drew five checks upon its commercial account with the Bank of Marin, San Rafael, California, and delivered them to the payee, Eureka Fisheries. The total amount of these checks was \$2,318.82. On September 26, 1963, before these checks had been presented to the bank for payment, Marin Seafoods filed a voluntary petition in bankruptcy in the United States District Court for the Northern District of California. The filing of such a petition constitutes an automatic adjudication of bankruptcy.<sup>1</sup> At the time Eureka Fisheries presented these checks to the Bank of Marin for payment, the bank had received no notice, nor had it any other knowledge, of Marin Seafoods' petition in bankruptcy. The bank, therefore, honored the checks and made payment to Eureka. John England, who was named trustee for the bankrupt, contended that the bank's payment of funds was an invalid transfer under the Bankruptcy Act and sought an order requiring the bank to pay over to him a sum equivalent to the amount of the checks. In the alternative, the trustee sought similar relief against Eureka Fisheries. The referee in bankruptcy determined that the bank and the payee were jointly liable to the trustee for the full amount of the checks. Eureka Fisheries paid the total amount to the trustee and filed with the bankruptcy court a demand for contribution from the bank.<sup>2</sup> On the bank's petition for review, both the district court and the United States Court of Appeals for the Ninth Circuit affirmed the referee's order.<sup>3</sup> The Supreme Court of the United States (Justices Harlan and Fortas dissenting) reversed and *held*: where there has been no actual revocation of a bank's authority and where a bank has no

---

<sup>85</sup> *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (dissenting opinion).

<sup>86</sup> *Ibid.*

<sup>1</sup> The Bankruptcy Act, § 18(f), 73 Stat. 109 (1959), 11 U.S.C. § 41(f) (1964) provides:

The filing of a voluntary petition under chapters I to VII of this Act, other than a petition filed in behalf of a partnership by less than all of the partners, shall operate as an adjudication with the same force and effect as a decree of adjudication.

<sup>2</sup> The fact that Eureka Fisheries, the payee, had paid the amount to the trustee raised the issue of mootness. The majority opinion of the Court, however, held that the issue of the bank's liability to the trustee was not moot because Eureka Fisheries had served on the bank a demand for contribution. *Bank of Marin v. England*, 87 Sup. Ct. 274, 276 (1966). But see the dissenting opinion of Mr. Justice Fortas in which he stated the trustee had no interest in this litigation, and thus this was not a case or controversy. *Bank of Marin v. England*, *supra* at 281 (dissenting opinion).

<sup>3</sup> *Bank of Marin v. England*, 352 F.2d 186 (9th Cir. 1965), *rev'd*, 87 Sup. Ct. 274 (1966).

notice or knowledge of bankruptcy proceedings, it would be inequitable to hold liable a drawee bank that paid checks of a bankrupt duly drawn, but presented and honored after bankruptcy. *Bank of Marin v. England*, 87 Sup. Ct. 274 (1966).

In *Bank of Marin* the Supreme Court was presented with a problem of statutory construction, as well as the role of equitable considerations in the administration of the Bankruptcy Act.<sup>4</sup> The Bankruptcy Act contains very explicit provisions regarding transfers of property from the bankrupt estate. Prior to 1938, the act did not allow any transfers of the bankrupt's property after a petition in bankruptcy had been filed. However, there developed important judicial exceptions to the act, and in 1938 the act was amended to codify them.<sup>5</sup>

Section 70(d) of the Bankruptcy Act, which was added to the act by the 1938 amendment, specifies what transfers of the bankrupt's property are valid. This section provides in part:

After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs— . . .

(2) A person indebted to the bankrupt or holding property of the bankrupt may, if acting in good faith, pay such indebtedness or deliver such property, or any part thereof, to the bankrupt or upon his order, with the same effect as if the bankruptcy were not pending;

(3) A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith unless he has reasonable cause to believe that the petition in bankruptcy is not well founded; . . .

(5) A person asserting the validity of a transfer under this subdivision shall have the burden of proof. Except as otherwise provided in this subdivision and in subdivision g of section 21 of this Act, [having to do with transfers of real estate, and thus having no bearing in this case] no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee: *Provided, however*, That nothing in this Act shall impair the negotiability of currency or negotiable instruments.<sup>6</sup>

Thus, if the Bank of Marin had transferred the bankrupt's property between the time a petition had been filed and the time of adjudication, the bank would not have been liable to the trustee due to the express language of subsection (2). However, since the filing of a voluntary petition in bankruptcy constitutes an automatic adjudication of bankruptcy,<sup>7</sup> there is no time gap between the time of filing and the time of adjudication. Under the express language contained in the beginning of section 70(d), such an interval is a requisite to being exempt from liability. Moreover, unless a transfer is specifically protected

4 52 Stat. 840 (1938), as amended, 11 U.S.C. §§ 1-1103 (1964).

5 Prior to 1938, it was held that banks which, in good faith, honored checks drawn by the bankrupt were not liable to the trustee where the checks were honored after the filing of the petition in bankruptcy, but before adjudication. See, e.g., *Citizens' Union Nat'l Bank v. Johnson*, 286 Fed. 527 (6th Cir. 1923); *In re Zotti*, 186 Fed. 84 (2d Cir.), cert. denied, 223 U.S. 718 (1911); *In re Retail Stores Delivery Corp.*, 11 F. Supp. 658 (S.D.N.Y. 1935). In 1938, the Bankruptcy Act was amended by adding § 70(d), which, in effect, codifies the above decisions. For a thorough treatment of the background leading to the enactment of § 70(d), see 4 COLLIER, BANKRUPTCY ¶ 70.66 (14th ed. 1964).

6 52 Stat. 881 (1938), 11 U.S.C. § 110(d) (1964).

7 Bankruptcy Act § 18(f). See note 1 *supra*.

by one of the shelter provisions of section 70(d), subsection (5) provides that "no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee."<sup>8</sup>

According to a strict reading of the Bankruptcy Act, therefore, the Bank of Marin would have been liable to the trustee for the value of the checks which it had paid to Eureka Fisheries. Such a holding would have subjected the bank to double liability even though it had no knowledge of the bankruptcy petition and there was no reasonable method by which it could have acquired such knowledge. Since every bank is under a duty to its depositors to honor their checks which are validly drawn,<sup>9</sup> holding banks liable to trustees in bankruptcy for honoring checks drawn by a depositor who later files a voluntary petition in bankruptcy would place banks in a serious dilemma. Thus, the Supreme Court was faced with the question as to what extent equitable principles ought to be applied to prevent the manifest inequity which would result from a strict reading of the Bankruptcy Act. The Court took the position that the language of the act should not be read "with the ease of a computer,"<sup>10</sup> and that equitable principles should govern the exercise of bankruptcy jurisdiction. Consequently, the Court held that it would be inequitable to hold a bank liable when it, in good faith and without knowledge that its depositor has filed a voluntary petition in bankruptcy, honors the bankrupt's checks in the regular course of its business.

In his dissenting opinion, Mr. Justice Harlan warned that the majority, "in its haste to alleviate an indisputable inequity to the bank, disregards . . . both the proper principles of statutory construction and the most permanent interests of bankruptcy administration."<sup>11</sup> Justice Harlan believed that the terms of the Bankruptcy Act were unambiguous and that under the explicit language of section 70(d) the bank was liable to the trustee. He went on to state, "I had thought it well settled that equity may supplement, but may never supersede the Act. . . . The Act's language is neither imprecise nor infelicitous;

---

8 See text accompanying note 6 *supra*. For a harsh application of § 70(d), see *Lake v. New York Life Ins. Co.*, 218 F.2d 394 (4th Cir.), *cert. denied*, 349 U.S. 917 (1955). In *Lake*, the defendant insurance companies had loaned the insured bankrupt money on his life insurance policies. On making the loan, the defendants had no knowledge that the insured had been adjudicated a bankrupt. Nevertheless, the court held the insurance companies were liable to the trustee for the full cash surrender value of the life insurance policies and were not allowed to set off the amount which they had loaned to the insured. In construing § 70(d), the court stated:

It is obvious that the intent of this enactment is to invalidate transactions not granted specific protection under the Act . . . . There is almost always some injustice or hardship which attends transactions occurring after the filing of a petition in bankruptcy between the bankrupt, acting wrongfully, and an innocent third person, because the loss must fall either upon the third person or upon the creditors of the bankrupt. *Id.* at 399.

9 Section 4-402 of the UNIFORM COMMERCIAL CODE, which has been adopted in almost every jurisdiction, provides:

A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

10 *Bank of Marin v. England*, 87 Sup. Ct. 274, 277 (1966).

11 *Ibid.* (dissenting opinion).



I can therefore see no room for the interposition of equity."<sup>12</sup>

Only one previous decision addressed itself to the problem present in *Bank of Marin*. In *Rosenthal v. Guaranty Bank & Trust Co.*,<sup>13</sup> a district court decision, a corporate depositor of the drawee bank filed a bankruptcy petition on October 3, 1951, and was adjudicated a bankrupt later the same day.<sup>14</sup> The defendant bank had, however, at various times between October 4 and October 10, honored checks which were drawn by the bankrupt prior to October 3. When the trustee in bankruptcy sought to recover the total amount of these checks, the court held that the bank was not liable. In so holding, the court did not rely on the principle of avoiding harsh double liability. Instead, it relied on the negotiability proviso at the end of section 70(d) that "nothing in this Act shall impair the negotiability of currency or negotiable instruments."<sup>15</sup> The court in *Rosenthal* reasoned that holding the bank liable would impair negotiability since it would tend to inhibit banks from freely honoring checks upon presentment.<sup>16</sup> The reasoning in *Rosenthal*, however, was the subject of much criticism.<sup>17</sup> Its reliance on the negotiability proviso is questionable since a surrender of a check upon presentation for payment at the bank is merely the fulfillment of a legal duty imposed on the holder,<sup>18</sup> and is not negotiation.

The Ninth Circuit's decision in *Bank of Marin* holding the bank liable to the trustee, rejected the *Rosenthal* rationale and stated that the negotiability proviso of section 70(d) did not protect the bank.<sup>19</sup> The court's holding was based on two premises. First, the court stated that the filing of the petition in bankruptcy automatically revoked the bank's authority to honor the bankrupt's checks. Second, section 70(a) of the Bankruptcy Act provides that the title to the bankrupt's property is immediately vested in the trustee by operation of law

<sup>12</sup> *Id.* at 281.

<sup>13</sup> 139 F. Supp. 730 (W.D. La. 1956).

<sup>14</sup> The petition in *Rosenthal* was one for reorganization under chapter X of the Bankruptcy Act. 52 Stat. 883 (1938), as amended, 11 U.S.C. §§ 501-676 (1964). Chapter X, § 102, 52 Stat. 883 (1938), 11 U.S.C. § 502 provides: "[T]he date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered."

<sup>15</sup> Bankruptcy Act, § 70(d)(5), 52 Stat. 882 (1938), 11 U.S.C. § 110(d)(5) (1964). See text accompanying note 6 *supra*.

<sup>16</sup> *Rosenthal v. Guaranty Bank & Trust Co.*, 139 F. Supp. 730, 734 (W.D. La. 1956).

<sup>17</sup> See 4 COLLIER, *op. cit. supra* note 5, at 1502-03 n.3; Seligson, *Creditors' Rights*, 32 N.Y.U.L. Rev. 708, 729-31 (1957); 31 REF. J. 95 (1957).

<sup>18</sup> See BRITTON, *BILLS AND NOTES* 118 (2d ed. 1961). UNIFORM COMMERCIAL CODE, § 3-505 provides:

- (1) The party to whom presentment is made may without dishonor require
  - (a) exhibition of the instrument; and
  - (b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and
  - (c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and
  - (d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.
- (2) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance. (Emphasis added.)

<sup>19</sup> *Bank of Marin v. England*, 352 F.2d 186, 189 (9th Cir. 1965), *rev'd*, 87 Sup. Ct. 274 (1966).

"as of the date of the filing of the petition."<sup>20</sup> Thus, the court reasoned that since the bank was without authority to honor the bankrupt's checks, the title to the full amount of the bankrupt's deposit became the property of the trustee.<sup>21</sup> The trustee was, therefore, entitled to recover his property.

The primary reason for which the Supreme Court overturned the Ninth Circuit's decision in *Bank of Marin* was its disagreement with the lower court's holding that the filing of a bankruptcy petition without notice constitutes an automatic revocation of the bank's authority to honor the bankrupt's checks. The Ninth Circuit cited two old state court cases in support of its conclusion.<sup>22</sup> The court then stated that since the trustee's title is immediately vested in him by operation of law, such revocation of authority is not dependent upon or subject to the bank's receiving notice. This revocation, the court stated, is an implied exception to the bank's contractual obligation to honor checks presented to it for payment.<sup>23</sup> It is submitted, however, that the Ninth Circuit's interpretation of the notice requirement is incorrect. In both cases that the court cited, the drawee bank had notice of the drawer's insolvency. Thus, the cases are clearly distinguishable from *Bank of Marin*. In fact, dicta in *Guthrie Nat'l Bank v. Gill*,<sup>24</sup> one of the cases cited by the Ninth Circuit, implies that if the bank did not have notice it would not have been liable.<sup>25</sup> A noted commentator has cited *Guthrie* as authority for the proposition that "a bank paying a check in good faith in ignorance of drawer's bankruptcy or insolvency is protected in its payment."<sup>26</sup>

In reversing the Ninth Circuit, the Supreme Court of the United States primarily took issue with the lower court's interpretation of the notice requirement. The Court stated:

The Court of Appeals held that the bankruptcy of a drawer operates without more as a revocation of the drawee's authority . . . . But

20 Section 70(a), 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1964) provides:

The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks, and in applications therefor . . . ; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . ; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property . . . ; and (8) property held by an assignee for the benefit of creditors . . . .

21 *Bank of Marin v. England*, 352 F.2d 186, 191-93 (9th Cir. 1965), *rev'd*, 87 Sup. Ct. 274 (1966).

22 The cases cited by the Ninth Circuit were *Harrison State Bank v. First Nat'l Bank*, 116 Neb. 456, 218 N.W. 92 (1928); *Guthrie Nat'l Bank v. Gill*, 6 Okla. 560, 54 Pac. 434 (1898).

23 *Bank of Marin v. England*, 352 F.2d 186, 191 (9th Cir. 1965), *rev'd*, 87 Sup. Ct. 274 (1966).

24 6 Okla. 560, 54 Pac. 434 (1898).

25 54 Pac. at 436.

26 BRADY, *BANK CHECKS* 25 (Bailey 3d rev. ed. 1962).

that doctrine is a harsh one that runs against the grain of our decisions requiring notice before a person is deprived of property . . . .<sup>27</sup>

The concept of notice as a part of due process was expressly laid down in *Mullane v. Central Hanover Bank & Trust Co.*<sup>28</sup> In that case, the Supreme Court of the United States held that beneficiaries of a common trust fund whose names and addresses were known were entitled to receive notice by mail of pending judicial settlement proceedings of their trust fund. In construing notice as an integral part of the fourteenth amendment, the Court stated:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information . . . .<sup>29</sup>

The general rule that emerges from *Mullane* is that fictional notice, such as notice by publication or notice by filing a petition, is not sufficient with respect to parties whose names and addresses are known and whose legally protected interests are directly affected.<sup>30</sup> Since the Supreme Court was construing the due process clause in *Mullane*, its interpretation of the notice requirement is equally applicable to all types of actions, including bankruptcy proceedings.<sup>31</sup> Thus, the Bank of Marin argued that the holding in *Mullane* placed a significant limitation on the effect of the Bankruptcy Act, which should not be construed to allow a deprivation of property without proper notice.<sup>32</sup> The Supreme Court agreed with this contention when it stated:

The kind of notice required is one "reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action." . . . We cannot say that the act of filing a voluntary petition in bankruptcy *per se* is reasonably calculated to put the bank on notice. Absent revocation by the drawer or his trustee or absent knowledge or notice of the bankruptcy by the bank, the contract between the bank and the drawer remains unaffected by the bankruptcy and the right and duty of the bank to pay duly presented checks remain as before. In such circumstances the trustee acquires no rights in the checking account greater than the bankrupt himself.<sup>33</sup>

The fact that the bank was held not liable to the trustee does not necessarily

27 *Bank of Marin v. England*, 87 Sup. Ct. 274, 276 (1966).

28 339 U.S. 306 (1950).

29 *Id.* at 314.

30 *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962).

31 See *City of New York v. New York, N.H. & H.R.R.*, 344 U.S. 293, 296-97 (1953); *Fraser, Jurisdiction by Necessity — An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305, 316-19 (1951).

32 This argument assumes that notice as a part of due process means substantially the same under both the fifth and the fourteenth amendments.

33 *Bank of Marin v. England*, 87 Sup. Ct. 274, 277 (1966).

impair the bankrupt's estate. Under section 60 of the Bankruptcy Act,<sup>34</sup> the trustee still has an action against the payee of the checks where he has received a voidable preference. Since the payee is a creditor of the bankrupt, a recovery from him of a voidable preference would restore him to the status of a general creditor. The Court noted this fact and concluded, "To permit the trustee under these circumstances to obtain recovery only against the party that benefited from the transaction is to do equity."<sup>35</sup>

The Court's holding in *Bank of Marin* seems to be based on sound policy considerations. Its decision requires the trustee to give notice. Since the trustee can easily ascertain the bank in which the bankrupt keeps its commercial account, this can hardly be said to impose an undue burden on the trustee. On the other hand, a contrary decision would mean that banks, in order to guard against possible double liability, would be required to read every bankruptcy notice published. This might not impose too great a burden if all the bank's depositors were domiciled within the immediate geographic area and all pertinent bankruptcy notices would appear in local newspapers. However, many banks have depositors who reside long distances away, and not infrequently outside the state. To hold banks liable under such circumstances would impose upon them the unrealistic duty to read virtually every newspaper in the country to investigate all pertinent bankruptcy notices. Such a burden would be intolerable.

William T. Coleman

---

34 The Bankruptcy Act, § 60, 52 Stat. 869 (1938), as amended, 11 U.S.C. § 96 (1964), deals with the recovery of voidable preferences. That section, in part, provides:

a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. . . .

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property. . . .

For a thorough treatment of the subject of voidable preferences, see 3 COLLIER, BANKRUPTCY 731-1201 (1966); 4 REMINGTON, BANKRUPTCY 187-396 (1957).

35 *Bank of Marin v. England*, 87 Sup. Ct. 274, 277 (1966).